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January 26, 1998

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments in MM Docket No. 97-234

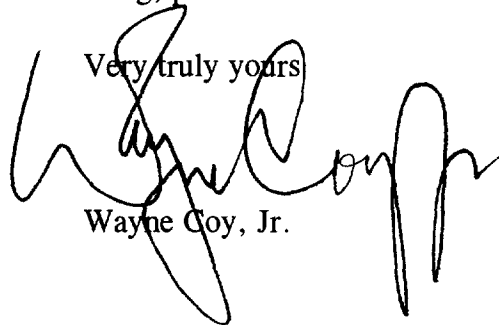
Dear Ms. Salas

Transmitted herewith, on behalf of the National ITFS Association, are the original and five (5) copies of its Comments in the above-referenced proceeding.

Should you have any questions with respect to this filing, please contact the undersigned.

Very truly yours

Wayne Coy, Jr.



Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
--Competitive Bidding for Commercial)	
Broadcast and Instruction Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

COMMENTS

The National ITFS Association ("NIA"), by and through its Counsel, files these Comments in the above-captioned proceeding to oppose the use of competitive bidding, also known as auctions, to resolve mutual exclusivity among applicants for Instructional Television Fixed Service ("ITFS") licenses. The competitive bidding provisions of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) are silent with respect to applications for ITFS frequencies. However, because the way the Act is structured, providing limited exceptions to the general rule requiring application of the competitive bidding process, and because the exception from the use of competitive bidding in Section 3002(a)(2) of that Act only mentions stations listed in Section 397(6) of the Communications Act of 1934, and further because ITFS licenses do not fall within the technical definition of Section 397(6), it is altogether too easy to infer a Congressional intent where, we argue, none was expressed nor intended. The legislative history of the Act, including the House

Report strongly suggest the contrary - that Congress never contemplated the use of competitive bidding for any noncommercial services. The exceptions listed in Section 3002(a)(2) of the Balanced Budget Act of 1997 clearly delineate Congress' desire to require auctions for commercial services while exempting noncommercial licensees engaging in noncommercial services from the auction procedure. None of the positive benefits Congress seeks to achieve in the communications industry by utilizing auctions will be met if ITFS licenses are subjected to competitive bidding. Finally, competitive bidding threatens the core educational purpose of ITFS licensees. In support of its position, NIA offers the following:

BACKGROUND

1. NIA is a national association of more than 70 educators in 26 states and the District of Columbia who are using ITFS frequencies to provide educational service to students enrolled in for-credit courses in elementary, secondary, college, post-graduate, and career training. The membership includes public, private and parochial schools, community and junior colleges, public and private universities, regional media centers, public broadcasters, state agencies, and non-profit corporations.

2. NIA's purpose is to promote the effective use of the ITFS spectrum for its intended educational use and to encourage and assist potential user institutions to develop local or regional instructional networks using ITFS. In addition, the association through a quarterly newsletter, keeps its members informed as to regulatory and judicial decisions affecting the industry and presents articles of interest to educators generally involved in "distance learning."

THE ARGUMENT

3. The exception from the requirement that the Commission use competitive bidding procedures when mutually exclusive applications are accepted for noncommercial educational and

public broadcast stations should also apply to ITFS licensees. A comparison of those services for which competitive bidding is required by the Balanced Budget Act of 1997 with those for which it was mandatory prior to the Act emphasizes that Congress intends the use of auctions to apply on a commercial/noncommercial basis rather than a broadcast/nonbroadcast basis. The legislative history accompanying the Balanced Budget Act of 1997 supports this distinction.

4. A close examination of the exceptions in Section 3002(a)(2) reveals Congress' intent to make competitive bidding mandatory only for commercial licensees. In addition to the exception for noncommercial educational broadcast stations described in section 397(6) of the Communications Act of 1934, Section 3002(a)(2) excepts from competitive bidding licenses or construction permits issued by the Commission "for public safety radio services, including private internal radio service used by State and local governments and nongovernment entities and including emergency road services provided by not-for-profit organizations that (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public." The common link between the two exceptions is clear: the licensee must be either a government or not-for-profit entity engaged in noncommercial services.

5. The legislative history of the Balanced Budget Act of 1997 reinforces this conclusion. The Conference Committee report accompanying the Balanced Budget Act of 1997 highlights the commercial/noncommercial distinction:

Second, the exemption from competitive bidding authority for "public safety radio services" includes "private internal radio services" used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities protect the safety of life, health, or property and are not made commercially available to the public. This service exemption also includes radio services used by not-for-profit organizations that offer emergency road services such as the American Automobile Association (AAA)...The conferees do not intend this

exemption to include internal radio services used by automobile manufacturers and oil companies to support emergency road services provided by those parties as part of the competitive marketing of their products.

H.R. Rep. No. 217, 105th Cong. 1st Sess. (1997)

6. It seem quite reasonable, logical, and even likely, that the reason Congress did not think of the ITFS service in creating this exception was because this service is virtually unknown outside the educational community. Alternatively, and, perhaps equally logically, the drafters of the legislation may well have thought that they were encompassing the entire range of educational uses of frequencies into the exception by citing the statutory provision. After all, ITFS licensees possess all of the characteristics inherent in the exception for section 397(6) stations. The ITFS licensee must be a not-for-profit (in this case, educational) institution or entity. It must offer a noncommercial, educational service. In fact, the “I” in ITFS, standing as it does for “Instructional”, and the description of the purposes and permissible service of the service, as contained in Section 74.931 of the Rules of the Commission (“Authorized ITFS channels must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools...””) as a description of the service is, if anything, more, not less, restricting than the description of the permissible service of a noncommercial educational broadcast licensee. Furthermore, the Commission has applied rules evenly to ITFS and noncommercial educational broadcasters regarding other financial matters, including payment of application fees. There is nothing within the Balanced Budget Act of 1997 to indicate that Congress does not want the same result with regard to the use of competitive bidding.

7. The legislative history of the Balanced Budget Act of 1997 clearly states Congress’ goals in expanding the use of auctions to award licenses more quickly and efficiently. The use of

auctions for ITFS licenses will not meet these goals (see below). The House Report accompanying the Balanced Budget Act of 1997 notes, "A wide array of innovative radio-based services, including personal communications services (PCS), narrowband and broadband paging services, and direct broadcast services (DBS), have expeditiously reached consumers as a result of auctions. Auctions also ensure that licenses are assigned to the entity most values the frequencies. Consequently consumers now enjoy the benefits of new and improved services that are offered in a more price-competitive marketplace." H.R. Rep. No. 149, 105th Cong., 1st Sess. (1997). ITFS was first authorized in 1963; it is not an innovative service. Nor is it a price-competitive marketplace. The ITFS marketplace is not about competition; it is about education. The NPRM's Regulatory Flexibility Analysis describes ITFS as "a non-pay, non-commercial educational microwave service" of which 1932 out of 2032 licensees generate "either \$10.5 million or less, or \$11 million or less, in annual receipts." Notice of Proposed Rulemaking in MM Docket No. 97-234, G.C. Docket No. 92-52, Gen. Docket No. 90-264, F.C.C. 97-397, Appendix B at 3 (1997). Such small operating budgets have precluded ITFS environment from being a price-competitive one. It has also precluded the ITFS licensees from valuing their licenses in monetary terms. The main concern has always been the ability to engage in high quality distance learning.

8. The House Report states that auctions are administratively efficient because they expedite licensing and ensure that new or additional services are rapidly deployed. H.R. Rep. No. 149, 105th Cong., 1st Sess. (1997). This goal is also inapplicable to ITFS. Mutual exclusivity among competing applications for the same frequencies in any area that cannot be resolved through negotiation, are resolved quickly and efficiently under the present "point" system under which applications are given points for being local, accredited, offering 20 or 40 or more hours of

instructional programs per week, etc. If two or more applications are awarded the same number of points, the matter is quickly settled by comparing the number of students at each applicant's enumerated receive sites. This simple paper procedures takes no time at all, and because the outcome is determined by the effective delivery to students of instructional programming, not by which applicant can out-bid the other, the system works. This system has proven to be quick, easy, inexpensive, and reliable, resulting in the greatest benefit to the greatest number of students.

9. Congress' purpose in extending the competitive bidding procedure to commercial broadcast licensees is to finally put to rest the use of the time-consuming, expensive, and controversial comparative hearing procedure. Because a successful alternative to comparative hearings already exists within ITFS, competitive bidding is not necessary for ITFS licenses.

10. Auctioning ITFS licenses would harm the service as a whole by further blurring the line between commercial MDS entities and noncommercial educational ITFS entities. MDS companies are willing to pay large sums to obtain the maximum amount of channels for wireless cable systems. Auctions would allow these companies to circumvent that process entirely and enter the one area from which they have been prohibited--ITFS channel ownership. MDS licensees could create non-profit shell corporations as ITFS licensees that would turn around and lease time at below market premium for MDS use. These nonprofits would win the ITFS license in any competitive bidding situation because an educational institution could never raise the capital necessary to challenge the MDS entrepreneur.

11. If the Commission feels that it has no choice but to adopt procedures leading to auctioning of ITFS licenses, the competitive bidding process should only apply to mutually exclusive applications filed after July 1, 1997. The mutually exclusive applications filed before that

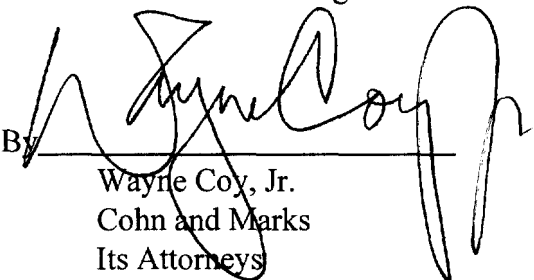
date should be resolved according to the point system in effect when the applications were filed. This will meet the expectations of the parties that filed the applications.

12. There is nothing to gain from requiring the use of competitive bidding for resolving mutually exclusive applications for ITFS licenses. The statutory scheme of the Balanced Budget Act of 1997 will not be fulfilled. The use of auctions will not meet any of Congress' desire goals with regard to telecommunications policy. Finally, competitive bidding threatens the existence of the very service to which it would be applied.

For the foregoing reasons, the National ITFS Association feels that the ITFS service should be treated no differently than any other noncommercial educational licensee with regard to the application of competitive bidding.

Respectfully submitted,
NATIONAL ITFS ASSOCIATION

By 
Kevin M. Goldberg

By 
Wayne Coy, Jr.
Cohn and Marks
Its Attorneys

January 26, 1998